No. 82-1177

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE AETNA CASUALTY AND SURETY COMPANY, AETNA INSURANCE COMPANY, AMERICAN EMPIRE INSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY, COMPAGNIES D'ASSURANCES DU GROUPE CONCORDE, CONTINENTAL CASUALTY COMPANY, EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, HARTFORD FIRE INSURANCE COMPANY, INDUSTRIAL INDEMNITY COMPANY, MARYLAND CASUALTY COMPANY, RELIANCE INSURANCE COMPANY, ROYAL INDEMNITY COMPANY, ST. PAUL FIRE AND MARINE INSURANCE COMPANY, SECURITY INSURANCE COMPANY OF HARTFORD, THE TRAVELERS INDEMNITY COMPANIES, UNDERWRITERS AT LLOYD'S AND ASSOCIATED BRITISH INSURANCE COMPANIES, UNITED STATES FIDELITY AND GUARANTY COMPANY, UNITED STATES FIRE INSURANCE COMPANY AND ZURICH INSURANCE COMPANY,

Petitioners,

—against—

UNITED STATES OF AMERICA, BERNARD C. GROSECLOSE, ALDEN E. HARE, WILLIAM L. HOGAN and DENNIS L. HUNTER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Questions Presented

Whether opposing counsel's conduct during trial, which was characterized by the dissenting judge below as "outrageous misbehavior", which rendered the trial a "travesty", and which was sanctioned by the majority opinion below, was such a departure from the accepted and usual course of judicial proceedings so that petitioners were denied a fair jury trial against the individual respondents and prejudiced in their case against the respondent United States.[1]

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[1]The only parties to the proceeding in the Court of Appeals were those parties appearing on the caption of this case. The petitioners herein are insurance companies and are not subsidiaries or affiliates of any publicly-owned corporation not named in the appeal of this matter, with the exception of the following: The Aetna Casualty and Surety Company which is a subsidiary of Aetna Life and Casualty Company, Hartford, Connecticut; Aetna Insurance Company which is a subsidiary of Connecticut General Insurance Corporation, Hartford, Connecticut; American Empire Insurance Company which is a subsidiary of American Financial Corporation, Cincinnati, Ohio; Commercial Union Insurance Company which is a subsidiary of Commercial Union Corporation, which is a wholly-owned subsidiary of Commercial Union Assurance Company, Ltd., London, England; Continental Casualty Company which is a subsidiary of CNA Financial Corporation, Chicago, Illinois; Hartford Fire Insurance Company which is a subsidiary of International Telephone and Telegraph Corporation, New York, New York; Industrial Indemnity Company which is a subsidiary of Crum & Forster, New York, New York; Maryland Casualty Company which is a subsidiary of American General Insurance Company, Houston, Texas; Reliance Insurance Company which is a subsidiary of Reliance Group, New York, New York (formerly Leasco Corporation); Royal Indemnity Company which is a subsidiary of Royal Insurance Company, Ltd., Liverpool, England; St. Paul Fire and Marine Insurance Company which is a subsidiary of The St. Paul Companies, Inc., St. Paul, Minnesota; Security Insurance Company of Hartford which is a subsidiary of The Security Corporation, Hartford, Connecticut, which is a wholly-owned subsidiary of Textron, Inc., Providence, Rhode Island; The Travelers Indemnity Company which is a subsidiary of The Travelers Corporation, Hartford, Connecticut; and United States Fire Insurance Company which is a subsidiary of Crum & Forster, New York, New York.

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OCTOBER TERM, 1982

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Opinions Below

The opinion of the Court of Appeals for the Fourth Circuit, printed in the separate Appendix hereto, *infra,* has been reported at 681 F.2d 186. The opinion of the United States District Court for the Western District of North Carolina, Charlotte Division,

printed in the separate Appendix[2] hereto, not yet officially reported, is unofficially reported at 16 Avi. Cases 17,592. Two earlier decisions rendered herein on the issue of disqualification of Government counsel are reported at 438 F. Supp. 886 (W.D. N.C. 1977), *reversed*, 570 F.2d 1197, *cert. denied*, 411 U.S. 986 (1978).

Jurisdiction

The judgment of the Court of Appeals was entered on June 4, 1982. A timely petition for a rehearing *in banc* was denied on August 19, 1982 and this petition for certiorari was filed within the extended time authorized by order of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statement of the Case

Petitioners are liability insurers of Eastern Air Lines, Inc., and hull insurers of Capital Management Corporation, the owner/lessor of a Douglas DC-9-31 aircraft, which while being operated as Eastern Flight 212 (EA 212), on September 11, 1974, crashed on approach to Douglas Municipal Airport, Charlotte, North Carolina. Eastern's liability insurers settled numerous claims and lawsuits arising out of the accident for $21,786,457.72, and the hull insurers paid $3,281,000 for the destruction of the aircraft (JA-1, 124-31). Petitioners then commenced the instant contribution action against the United States, three air traffic controllers (Messrs. Hare, Hogan and Hunter) at the Charlotte Tower who were providing air traffic control services to EA 212 at the time of the accident, and the Chief of the Charlotte Tower (Mr. Groseclose).

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[2]"Appendix" references are to the separate Appendix hereto. "JA" references are to the Appendix filed in the Court of Appeals and "AE" to the Appendix of Exhibits. The Roman numeral following the hyphen refers to the volume number and the digit following the comma is a page reference within said volume. Petitioners have been advised by the Clerk of the Court of Appeals, that the record below should not be forwarded to this Court unless requested.

The District Court consolidated petitioners' action with three passenger cases pending against Eastern Air Lines, for discovery and trial, but indicated that it would reconsider trial consolidation upon completion of discovery (JA-1, 190-93). After discovery, petitioners and Eastern moved to sever the cases and urged the District Court to have two trials, one involving the remaining passenger cases against Eastern—*Arnold, Mihalek*, and *Weston*—and the other the contribution claims of petitioners and Eastern against the respondents. The District Court denied both motions to sever, but stated that it would ask the jury to render an advisory verdict against the United States (JA-1, 332-40).

At trial, petitioners and Eastern conceded that the EA 212 flight crew was negligent but contended that respondents were also negligent, and liable for contribution, in that although the air traffic control radarscopes displayed EA 212's altitude, respondents did not advise the flight crew that EA 212 had descended below minimum altitude, and respondents watched in silence as EA 212 flew into the ground; petitioners also contended that the individual respondents were improperly trained and supervised. Respondents denied these allegations, contending that the sole proximate cause of the crash was the flight crew's negligence.

After petitioners rested, the District Court inexplicably reversed its previous position and announced that it would not ask the jury for an advisory verdict as to the liability of the Government. No explanation was given to the jury even though the Court had previously told the jury that they would render a verdict as to the liability of the Government. On November 24, 1979, the jury returned substantial verdicts for plaintiffs in the *Arnold, Mihalek* and *Weston* cases, and returned a verdict of no punitive damages against Eastern and no liability as to respondents Groseclose, Hare, Hogan and Hunter (JA-1, 377-79).

On March 12, 1980, the District Court entered its findings and conclusions as to the Government, holding that it was not

negligent and dismissing petitioners' complaint (JA-I, 481-524). Petitioners' motion for judgment n.o.v. or a new trial of the claims against the individual respondents was denied, and judgment was entered in respondents' favor (JA-I, 381-98, 478-524).

The issues raised by petitioners on appeal were that the District Court's findings that the Government was not negligent were clearly erroneous; petitioners were prejudiced by improper remarks of opposing counsel and their witness; the District Court committed reversible error in the charge; it was prejudicial to consolidate petitioners and the passenger actions for trial; and the District Court erred in excluding evidence relating to improper training and supervision of the individual respondents.

On June 2, 1981, petitioners' appeal, which was consolidated with appeals filed by Eastern, was orally argued, and on June 4, 1982—*one year and two days later*—a panel of the Court of Appeals rendered its 64-page opinion unanimously affirming the dismissal of petitioners' complaint, affirming by a majority the judgments against Eastern in *Arnold* and *Mihalek*, but reversing the judgment against Eastern in *Weston*.

Both Eastern and petitioners filed timely motions for rehearing *in banc* in the Court of Appeals. Petitioners' petition for rehearing was denied on August 19, 1982. On November 16, 1982 petitioners' time to file the instant petition was extended by Chief Justice Burger to January 14, 1983.

On December 23, 1982, by a 5-4 vote with one active judge recusing himself, the Court of Appeals granted Eastern's petition for rehearing *in banc*, but reserved decision as to the correctness of the granting until after briefing and argument (Addendum annexed hereto).

It would appear appropriate that this Court not issue a final decision on the instant petition for certiorari until the Court of Appeals decides Eastern's petition for rehearing. If the Court

of Appeals denies Eastern's petition, Eastern will probably petition to this Court, and if the Court of Appeals reverses the Panel below, their opinion will probably be applicable to this Court's consideration of the instant petition.

REASONS FOR GRANTING THE WRIT

1. The behavior of opposing counsel during the course of trial was so unacceptable that the failure of the Court of Appeals to condemn such misbehavior will alter the accepted and usual course of judicial proceedings in the federal courts.

The opinion by the Court of Appeals herein will eventually be read by every law student in the nation as part of a legal ethics course. Every professor who teaches such a course will universally condemn the majority opinion, and cite the trial behavior of counsel therein as examples of how an attorney should not act. Unfortunately, every student will file the case away as the ultimate example of "what you can get away with" in the courtroom.

Judge Murnaghan, in his dissenting opinion in the Court of Appeals, referred to opposing counsel's behavior as "abusive and overreaching". Statements by opposing counsel were characterized as "blatantly improper brayings" and "egregiously unprofessional utterances". Judge Murnaghan was of the opinion that the gross abuses were a direct result of how the District Court handled the trial:

> "In sum, it seems that Judge McMillan was carried away with enthusiasm for the seeming reasonableness and efficiency of his consolidation plan. He was so committed to it that he could not bring himself to abandon it, even when outrageous excesses by counsel for the individual plaintiffs turned trial to travesty.

> What appears to have happened is that counsel for the three plaintiffs and for the government, learning the district judge's final determination that there was to be one trial and one trial only, knew that they could safely practice gross abuses, in the certain knowledge that they ran no risk that the district court would employ that extreme, but ultimately efficacious, sanction, namely declaration of a mistrial." (Appendix A46)

Judge Murnaghan concluded:

> "In the majority's opinion we observe an open invitation to outrageous misbehavior by trial lawyers.
>
> * * *
>
> Counsel now are insulated from any adverse consequences of utterly unprofessional conduct so long as they are careful to keep invectives in the gutter. The majority places its *imprimatur*, its *nihil obstat* upon uninspired flights of invective. . . . The maintenance of proper court room standards has suffered a grievous blow from this day's work. I pray for its recovery." (Appendix A47)

The abusiveness of the trial behavior herein can only be appreciated by a brief description of some of the highlights of the prejudicial remarks by opposing counsel.

Counsel for the respondents (Mr. Pangia) started early during the trial when on jury selection he referred to the fact that the individual respondents were being sued "personally for $35,960,686.50 plus interest", that the individual respondents lived and worked in the area except for Mr. Hunter who used to live there; that the individual respondents had wives and children, and that one of Mr. Hunter's children recently died of leukemia (JA-II, 615).

On opening statement, one of plaintiffs' counsel (Mr. Smiley) implied that petitioners' claim for contribution was not what "you would expect to hear from a corporation that is sorry for what it did" (JA-II, 648-49).

On opening statement the respondents' attorney again referred to the fact that each of the individual respondents was being sued for over $35 million (JA-II, 663-64). The claim for contribution was referred to as "a lot of folly", and the attempt was initiated to mislead the jury into believing that the only issue they had to decide was whether the individual respondents flew the airplane into the ground (JA-II, 664).

During the trial the respondents' attorney made a point of advising the jury that a large portion of the insurance risk was insured by two foreign insurance groups. A motion to strike his remarks was denied (JA-VI, 2585).

In his closing argument, the attorney for the respondents disregarded all the rules in his plea to the jury. For example, he implied that the individual respondents had not been allowed to "forget this accident" because of lengthy depositions (none of which were in evidence and in any event would be irrelevant) (JA-VI, 2685). He then proceeded to tell the jury that he was "very angry"; that the claim alleged by Eastern was a "lack of accountability" and that Eastern was trying to "pass the buck"; and that Eastern was trying to get the jury to believe that the individual respondents "helped fly that plane into the ground" (JA-VI, 2686).

Mr. Pangia then argued that Eastern Air Lines should not talk about "fairness" because they sued the individual respondents for $35 million plus interest plus costs; that Eastern wants the individual respondents to pay for the costs of "this whole shooting match"; that Eastern was "just a little poor airline" though they offered to buy National Airlines; and that Eastern figured the individual respondents "could borrow" the $35 million (JA-VI, 2687).

Going forward with his tirade, Mr. Pangia claimed that Eastern was "dragged into the courtroom" because "they did not want to pay" and that the "passengers had to sue them" (JA-VI, 2687-

88). Again he alleged that Eastern was trying "to pass the buck to these air traffic controllers" and that Eastern's attorney was "rightfully" "ashamed of it" because it was unfair "doing what they're trying to do to these people for doing their job" and that the plaintiff passengers were "honest" in not suing the individual respondents (JA-VI, 2688).

Mr. Pangia then accused the petitioners of trying "to get somebody else involved" so as "to recoup" some losses and "pass it off to someone else" (JA-VI, 2688). The contribution suit was described as an effort "to stick it to these gentlemen for 36 million dollars" and to "put it on the air traffic controllers" (JA-VI, 2689, 2693).

The jury was told that Mr. Hunter "has lived with this nightmare for three years" and that for doing his job "his reward" is a lawsuit for three years and $35 million, plus interest and costs (JA-VI, 2697), and that Mr. Pangia was "worried" and that it was "frightening" that Eastern was asking why the individual respondents did not do their job (JA-VI, 2700).

Eastern's cross-examination of various witnesses was placed in the context of "they haven't learned" by Mr. Pangia (JA-VI, 2702-03). Eastern's defense was likened to that of a "bank robber" and that such a defense was "an attitude endorsed by a major corporation of coming in here and trying to pull a cop-out." Mr. Pangia then told the jury that to "tolerate" such an attitude was "the beginning of the end" (JA-VI, 2705-06). Such an "attitude" by Eastern Air Lines was described as a "monster on the loose" (JA-VI, 2706-07).

Mr. Pangia then accused Eastern of misuse of a product, suing the individual respondents for $35 million and "[t]he reason it hurts, the reason for the spite is this monster on the loose" (JA-VI, 2708).

In a final outburst, Mr. Pangia referred to Eastern and petitioners' attorneys as "the gang" and pleaded with the jury to

"end this three year nightmare for these gentlemen. Their reputation in the community, facing their families, you know what it's like to go home with a lawsuit like that to live with for three years. They have been literally held as hostages for three years. Try to go to a bank and make a loan, try to buy a car and have to explain . . . end the nightmare, please" (JA-VI, 2709).

This blatant appeal by Mr. Pangia to the passion and prejudice of the jury obviously had no place in an American courtroom, and should not have been condoned either by the District Court or the Court of Appeals. Unfortunately, the failure of the District Court to censure Mr. Pangia only encouraged the plaintiffs' attorneys to engage in similar tirades. Mr. Smiley quoted with approval the argument that Eastern's and petitioners' suit for contribution was an attempt "to shift responsibility for this crash to the air traffic controllers" (JA-VI, 2744). He also argued that Eastern was presenting a "cop-out" defense and then he presented his own personal assessment that the respondents were not sued because they were not liable and it would be a breach of counsel's duty "as officers of the court" to sue someone who was not responsible (JA-VI, 2747, 2748-49).

The final tirade was presented by plaintiffs' counsel, Mr. Diehl, who started right off by clapping his hands in mock applause of the attorneys for Eastern and petitioners, and telling the jury that they were "the best Eastern's money can buy" (JA-VI, 2749-50). He then pretended to place a keg of dynamite under the table where Eastern and petitioners' attorneys were sitting and blow-up "the gang" (JA-VI, 2751-52).

Mr. Diehl then asked the jury to imagine "being fried in Eastern Airlines' kerosene and how that feels," and suggested that Eastern's counsel would have preferred that Mr. Arnold had not gotten out of the aircraft (JA-VI, 2755).

Not being content with just telling the jury of the injuries his client suffered, and that Mr. Arnold was "peeled, skinned alive

and watching it" (JA-VI, 2758), Mr. Diehl found it necessary to discuss Eastern's and petitioners' case against the respondents. According to Mr. Diehl the claim for contribution was "most illogical," Eastern's bad joke, a "cop-out," and a poor "attitude." He attributed to Eastern's counsel a description of the individual respondents as "murderers' row" and that they wanted "to put the blame on somebody else." That Eastern was suing the individual respondents for "all the carnage and horror" that it caused. That the actions by Eastern and petitioners in filing a suit for contribution "made Scott Crossfield sick" [plaintiffs' expert witness], made Mr. Diehl sick, and he hoped that it would make the jurors sick (JA-VI, 2760).

Mr. Diehl then proceeded to describe the contribution claim as "outrageous" and the "ultimate disgrace of failure to accept responsibility" (JA-VI, 2761). Petitioners' and Eastern's expert witnesses were personally disparaged by allegations that they had "bionic ears" and suggestions that they would say anything for $40 an hour (JA-VI, 2761).

Mr. Diehl then expressed his own opinion on the credibility of one of petitioners' witnesses by stating "I don't think there was a bit of merit in anything he said" (JA-VI, 2761).

Not content with his attack on expert witnesses, Mr. Diehl found it necessary to describe the President of Eastern Air Lines (Frank Borman) as "pompous", a "new-found hero" with a "luminiscence" and a "glow" (JA-VI, 2763), and when Mr. Diehl's behavior was questioned by Eastern's counsel, his response was that he wanted to scream at and "whack" the attorney for Eastern Air Lines (JA-VI, 2766).

Based upon the foregoing, petitioners would submit that the trial judge permitted closing argument by Messrs. Pangia, Smiley and Diehl to become a three-ring circus, and that their vituperation constituted an unconscionable appeal to the passion and prejudice of the jury. In such a situation, the law is well estab-

lished that the Court of Appeals should have reversed and remanded petitioners' case for a new trial. *See New York Central R.R. Co.* v. *Johnson*, 279 U.S. 310, 317, 319 (1928); *Draper* v. *Airco, Inc.*, 580 F.2d 91, 95 (3d Cir. 1978); *Gilbert* v. *Gulf Oil Corp.*, 175 F.2d 705 (4th Cir. 1949) (judgment was reversed because of improper arguments by counsel that appealed to local prejudice by repeated references to out-of-state insurance companies as being the interested parties); *Accord, London Guarantee & Accident Co.* v. *Woelfle*, 83 F.2d 325, 338-44 (8th Cir. 1936); *Foster* v. *Crawford Shipping Co.*, 496 F.2d 788, 792 (3d Cir. 1974); *Pingatore* v. *Montgomery Ward & Co.*, 419 F.2d 1138 (6th Cir. 1969), *cert. den.*, 398 U.S. 928 (1970) (counsel's antics during closing argument required reversal); *San Antonio* v. *Timko*, 368 F.2d 983 (2d Cir. 1966) (calling the defendant a villain and making personal attacks on the character of defense counsel required reversal); *Missouri-K.T.R. Co.* v. *Ridgway*, 191 F.2d 363 (8th Cir. 1951) (unwarranted denunciations of defendant and its counsel required reversal); *Crowell-Collier Pub. Co.* v. *Caldwell*, 170 F.2d 941, 944-45 (5th Cir. 1948) (error by the trial judge in permitting a "public gladiatorial exposition"); *Aetna Life Ins. Co.* v. *Kelley*, 70 F.2d 589, 594-95 (8th Cir. 1934) (intemperate remarks concerning defendant's witnesses required reversal).

Likewise, attempts to appeal to the relative wealth of the parties, the family status of one of the parties, or the improper reference to children has been held to be prejudicial error. *Draper* v. *Airco, Inc.*, 580 F.2d 91, 95 (3d Cir. 1978); *Edwards* v. *Sears, Roebuck & Co.*, 512 F.2d 276, 285-86 (5th Cir. 1975); *Washington-Annapolis Hotel Co.* v. *Riddle*, 171 F.2d 732, 740 (D.C. Cir. 1948); *Chicago, St. P., M. & C.R. Co.* v. *Arnold*, 160 F.2d 1002, 1008 (8th Cir. 1947).

Furthermore, counsel taking a personal position before the jury on the merits of the case or the testimony of a particular witness is prohibited by the North Carolina Code of Professional Responsibility:

"DR 7-106(c) In appearing in his professional capacity before a tribunal, a lawyer shall not:

> (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant . . . ; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein." 4A N.C. Gen. Stat. Append. VII (Supp. 1977).

Failure to follow the Code of Professional Responsibility by making improper statements to the jury has been held to be reversible error. *Draper* v. *Airco, Inc.*, 580 F.2d 91, 95-96 (3d Cir. 1978); *United States* v. *Diharce-Estrada*, 526 F.2d 637, 641-42 (5th Cir. 1976); *Greenberg* v. *United States*, 280 F.2d 472, 474-75 (1st Cir. 1960); *McMillian* v. *United States*, 363 F.2d 165, 168-69 (5th Cir. 1966).

The "out-of-bounds" behavior of opposing counsel was mirrored in the deliberate set-up of one of plaintiffs' expert witnesses wherein he was allowed to tell the jury in response to his counsel's question as to why he was testifying:

> "I came back because I learned that day that these accidents still hadn't got the airlines' attention and that they were trying to cop-out by blaming the controller, and as an aviator I could not abide that kind of cynical reaching for the pits." (JA-IV, 1660-61)

This set-up remark by the witness that a valid claim for contribution was a "cop-out" that he "could not abide" was extremely prejudicial and the failure of the District Court to strike the entire statement and instruct the jury to disregard it should have been reversible error. *See Beck* v. *Wings Field, Inc.*, 122 F.2d 114 (3d Cir. 1941); *United States* v. *Conley*, 503 F.2d 520 (8th Cir. 1974); *cf. United States* v. *Andrea*, 538 F.2d 1255 (5th Cir. 1976).

The prejudice of this witness' remarks eventually culminated in the ultimate prejudice of all–the District Court's refusal to instruct the jury as to what a contribution suit was all about (JA-VI, 2802-03). Without any guiding instructions from the Court, a claim for contribution was just a "cop-out" as far as the jury knew.

To compound the prejudicial nature of the failure to properly charge, the District Court had told the jury at the start of the trial that they would render a verdict on the liability of the Government (the jury was not told that their verdict would be advisory). After petitioners presented their case, the District Court Judge told counsel he had changed his mind and would not ask for an advisory verdict, but that he would give an instruction that if the jury found the controllers liable, the Government would be liable under *respondeat superior*. After closing argument, the Court refused to give the charge as previously stated. The jury was never told why they were no longer passing on the liability of the Government. The charge by the District Court was a disgrace.

Despite all of the above, the majority and dissenting opinions in the Court of Appeals found no prejudice to petitioners, apparently on the basis that the jury was not prejudiced by the improper arguments of counsel (majority view), and that since the claim against the Government was non-jury and the Government was exonerated by Judge McMillan, the provisions of 28 U.S.C. §2676 would bar a retrial against the individual respondents (minority view).

The reasoning followed by the Court of Appeals completely overlooks the effect that the improper arguments had on the jury. It ignores the fact that if the trial behavior of opposing counsel had been controlled and the jury properly instructed on the law, *a jury verdict against the individual respondents would have required a directed verdict against the United States.*

The negligence of the individual respondents was blatant–

indeed the failure of the Court of Appeals to even mention the factual and legal claims against the Government in its opinion should be cause for shame.[3] Nevertheless, the evidence was undisputed at trial that on its approach to the runway for landing, EA 212 was required to pass a point in space called the Ross Intersection at an altitude of 1,800 feet. EA 212 crossed this point, but at an altitude 500 feet lower than the compulsory 1,800 feet crossing altitude. Respondent Hunter, who had a radar which displayed EA 212's altitude, testified that if he had been aware that EA 212 was 500 feet below the minimum crossing altitude at Ross, he would have called that to the attention of the flight crew, but that he failed to notice EA 212's altitude when he looked at the radarscope:

> "Q. So when you looked at Ross, looked at Eastern 212 that last time and saw it in the vicinity of Ross, if you had observed that 212 was crossing Ross at a 1,300 foot altitude, based upon the readout, you would in some way call it to the attention of the crew of 212. Is that right?
> A. I believe I would have, yes, sir.
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> * * * *

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[3]This Court is referred to the excellent speech by Judge Bernard S. Meyer of the New York Court of Appeals on "The Need for Reasoned Judicial Opinions" given before the American Law Institute on May 19, 1982 in Philadelphia and reprinted at page 2 of the ALI-ABA CLE Review of September 24, 1982 (Vol. 13, No. 39). In that speech Judge Meyer pointed out ". . . that Courts must not only do justice, but also that it must *appear* that justice is being done . . . the parties and the public are entitled to know on exactly what basis the judge or judges acted. * * * *Justice on Appeal* tells us that 'every decision of an appeal . . . should be accompanied by a statement of reasons, however brief'. This means not only abolishing the 'affirmed, no opinion' entry . . . but requiring that findings of essential facts and reasons for the decision be stated. It also means not only articulation of reasons rather than simply stating conclusory euphemisms, but, further, being candid about both the derivation of judicial powers and deviations from previously declared substantive rules."

In the instant case the Court of Appeals devoted all of one paragraph to conclusory euphemisms affirming the decision against petitioners. 681 F.2d at 205-06.

Q. Now, sir, can you tell the Court and the jury why, if you looked at the radarscope at about the time that Eastern 212 crossed Ross, why you didn't notice that he was at an altitude some 500 feet below the minimum crossing altitude and bring that fact to the attention of the crew?

A. Well, it's very simple. I'm separating airplanes. I'm separating radar targets. The aircraft that was to follow 212, I had to make sure before I turned him on the final approach course that he was at least three miles behind the target, the radar target of Eastern 212; so I glanced like that, just flipped the eyes over at the radar target, which I saw approaching Ross. I had no need at that time to utilize the information of either the ground speed nor the altitude of Eastern 212 to separate him from any other airplane; therefore, I wasn't watching for it. I was looking to see where the radar target was in order that I could have three miles fore and aft.

Q. So your testimony is that you looked but you didn't see it?

A. That is correct, sir." (JA-V, 2258-59).[4]

The foregoing testimony by Mr. Hunter clearly established the negligence of the Government since under North Carolina law an individual who is under an obligation to keep a lookout

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[4]The controllers in the tower cab, including respondents Hare and Hogan, also were aware of EA 212's low altitude but had failed to issue a warning to the aircraft. The following extracts appeared upon the air traffic control tapes:

1131:12 You see that Eastern? (AE-II, 568 (Ex. 5138)).
1133:57 Holy Christ! (AE-II, 569 (Ex. 5138)).
1133:57 . . . Who's that? . . . They're down . . . (AE-II, 551 (Ex. 5136), JA-VI, 2577).
1134:21 Holy Christ, where did he go? (AE-II, 551 (Ex. 5136)).
1134:43 I just cleared him. (AE-II, 551 (Ex. 5136)).
1134:48 I'm telling ya, Hare did that. (AE-II, 552 (Ex. 5136)).
1136:19 You could tell he was in trouble. (AE-II, 569 (Ex. 5138)).

Based upon these statements, it was absolutely clear that the controllers in the Tower Cab knew before the accident that EA 212 "was in trouble" and they should have issued a warning.

is "held to the duty of seeing what he ought to have seen." *Wall* v. *Bain*, 222 N.C. 375, 379, 23 S.E.2d 330, 333 (1942); *Raper* v. *Byrum*, 265 N.C. 269, 274, 144 S.E.2d 38 (1965). As the Court of Appeals held in *Rundle* v. *Grubb Motor Lines, Inc.*, 300 F.2d 333, 338 (4th Cir. 1962): "It was [appellee's] duty to keep a lookout and to see what was to be seen." Similarly, as the Court of Appeals for the Tenth Circuit held in *United States* v. *Murray*, 463 F.2d 208, 210 (10th Cir. 1972):

> "The next question is whether or not the failure of the attendant on duty to hear at least three passes amounts to negligence proximately causing the accident. We agree with the trial judge that it does. Watching and listening for just such requests for runway lighting was part of his job according to his own statement, and we think that in the careful discharge of this duty three passes should have been enough to attract his attention. He testified that it was difficult to hear planes overhead from inside the service station, a possible, even probable, explanation of his failure to hear the plane earlier, but not an excuse."

With this clear cut evidence of negligence,[5] the only explanation for the jury exoneration of the individual respondents is the prejudicial comments by opposing counsel and the failure of the District Court to explain to the jury that a valid claim for contribution was not a "cop-out" or a "lack of accountability" or a "monster on the loose".

If the jury had returned a verdict against the individual respondents, then petitioners would have moved for a directed verdict since it was admitted by the Government that at all times

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[5]Petitioners submit that if a driver drove through a stop sign and ran into another car, his explanation that he looked but didn't see the stop sign would be laughed out of court. Here the District Court elevated such an argument to a meritorious defense by writing an opinion that had no evidentiary support in the record. The failure of Judge Phillips in the Court of Appeals to analyze the facts or the law in light of petitioners' 75-page brief on the merits is inexplicable.

the individual respondents were acting within the course and scope of their employment.

> "Under the doctrine of *respondeat superior* the master, or employer, is liable for the negligent acts or omissions of his servant, or employee, while acting as such and within the 'scope of his employment'. . . . Unless there is no material issue of fact as to whether the employee was acting within the scope of his employment . . . the question will be submitted to the jury."

Thomas v. *Poole*, 45 N.C. App. 260, 262, S.E.2d 854, 856, *petition denied*, 300 N.C. 202, 269 S.E.2d 628 (1980). *See also Jackson* v. *Mauncy*, 260 N.C. 388, 132 S.E.2d 899 (1963); *Kiser* v. *Neumann Co. Contractors*, 426 S.W.2d 935, 938 (Ky. 1967); *Restatement (Second) of Agency* § 219(1). Indeed, as stated by the Fourth Circuit in its earlier decision in this litigation:

> "As heretofore noted, the plaintiffs allege, and the Government admits, that the controllers were acting within the course and scope of their employment at the time of the crash, and under such circumstances *any finding of negligence against them would be imputable to the Government and place liability upon it under the Tort Claims Act.*"

Aetna Cas. & Sur. Co. v. *United States*, 570 F.2d 1197, 1201 (4th Cir.), *cert. den.*, 439 U.S. 821 (1978). (emphasis added)

It is thus apparent that the prejudicial statements of opposing counsel, which went uncorrected by the District Court were directly responsible for the jury's verdict and in turn prevented petitioners from obtaining a directed verdict against the respondent United States. Once the jury verdict was returned, the District Court did not have the courage to condemn the abuses and set the verdict aside, and the Circuit Court's tragic *apologia* is destined to become a law professor's delight and the unethical trial lawyer's favorite citation.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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ADDENDUM

Clerk's Letter to Counsel Concerning Order Granting Rehearing In Banc

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
UNITED STATES COURTHOUSE
TENTH & MAIN STREETS
RICHMOND, VIRGINIA 23219

WILLIAM K. SLATE, II
CLERK

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December 27, 1982

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Clerk's Letter to Counsel Concerning Order Granting Rehearing In Banc

Re: 80-1245, 80-1246, 80-1247, 80-1334, Eastern Air Lines, Inc., et al vs. Richard Arnold, IV, et al

Dear Counsel:

Enclosed are two orders, one is granting the petition for rehearing en banc, the second one is establishing a briefing schedule for supplemental briefs. These cases are tentatively calendared for the rehearing at the February 1983 Session.

Sincerely yours,

WILLIAM K. SLATE, II

Carol R. Lemon
By: (Mr.) Carol R. Lemon
Chief Deputy Clerk

CRL:fls
Encls.

Order Granting Rehearing In Banc

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1245

RICHARD ARNOLD, IV

Appellee,

versus

EASTERN AIR LINES, INC.,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

No. 80-1246

FRANCIS C. MIHALEK,

Appellee,

versus

EASTERN AIR LINES, INC.,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

No. 80-1247

HELEN RAE WESTON, etc.,

Appellee,

versus

EASTERN AIR LINES, INC.,

Appellant.

Order Granting Rehearing In Banc

No. 80-1334

THE AETNA CASUALTY AND SURETY COMPANY, et al.,
Appellants,

versus

UNITED STATES OF AMERICA, et al.,
Appellees.

ORDER

The petition for rehearing and suggestion for rehearing in banc on behalf of Eastern Air Lines, Inc., and the responses thereto having been read and considered; a poll on the suggestion for rehearing in banc having been requested; and Judge Ervin having recused himself, Judges Winter, Russell, Widener, Murnaghan and Chapman having voted to grant rehearing in banc and Judges Hall, Phillips and Sprouse, together with Judge Butzner who voted before he took senior status, having voted to deny rehearing in banc, it is ORDERED that the petition for rehearing in banc is granted, subject to the condition that the parties file supplemental briefs, in accordance with a schedule to be fixed by the Clerk, on the issue of whether rehearing in banc has been properly authorized and be prepared to argue their views when the case is reached for reargument. *See, e.g.*, Zahn v. International Paper Co., 469 F.2d 1033 (2 Cir. 1972), *affirmed on other grounds*, 414 U.S. 291 (1973); Boyd v. Lefrak Organization, 517 F.2d 918 (2 Cir. 1975); Schenker v. Baltimore & Ohio RR., 374 U.S. 1, 4-5 (1963); Comment, *Federal Jurisdiction and Practice*, 47 St. John's L. Rev. 339, 348 (1972). After briefing and argument, the court will make a final ruling as to whether the rehearing in banc has been properly authorized.

FOR THE COURT

/s/ HARRISON L. WINTER
Chief Judge

Order Establishing A Briefing Schedule

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 80-1245

RICHARD ARNOLD, IV

Appellee,

versus

EASTERN AIR LINES, INC.,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

No. 80-1246

FRANCIS C. MIHALEK,

Appellee,

versus

EASTERN AIR LINES, INC.,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

No. 80-1247

HELEN RAE WESTON, etc.,

Appellee,

versus

EASTERN AIR LINES, INC.,

Appellant.

Order Establishing A Briefing Schedule

No. 80-1334

THE AETNA CASUALTY AND SURETY COMPANY, et al.,
Appellants,

versus

UNITED STATES OF AMERICA, et al.,
Appellees.

ORDER

In accordance with the court's order of December 23, 1982 granting the petition for rehearing en banc,

IT IS ORDERED that:

1. the parties are directed to file supplemental briefs in accordance with the court's order on or before *January 19, 1983.*
2. the supplemental reply brief on behalf of the appellants and appellees shall be filed on or before *January 28, 1983.*

For the Court–By Direction.

/s/ WILLIAM K. SLATE, II
Clerk